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SUPREME COURT OF APPEALS OF VIRGINIA.

COMMONWEALTH v. GOODWIN.

March 18, 1909.

[64 S. E. 54.]

1. Criminal Law (§ 1024*)—Writ of Error—Petition of Commonwealth.—Const. art. 6, § 88 (Code 1904, p. ccxxx), and Code 1887, § 4052 (Code 1904, p. 2134), giving the Supreme Court of Appeals jurisdiction to grant a writ of error on petition by the commonwealth in a case for violating a law relating to the state revenue, applies to a prosecution for unlawfully selling malt liquor, where the issue was whether accused could sell malt beverage under the revenue law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1024.* 1 Va.-W. Va. Enc. Dig. 473.]

2. Intoxicating Liquors (§ 134*)—"Malt Beverages"—Sale—"Malt Liquor."—Byrd Law (Acts 1908, pp. 275-287, c. 189) § 23½, defines "malt beverage" a nonintoxicating liquor, and requires the manufacturer to pay a special license tax and give a bond. Section 28 provides that the act shall not affect municipal charter provisions respecting licenses. Manassas Charter (Acts 1901-2, p. 216, c. 215; Acts 1906, p. 204, c. 128) § 14, requires the payment of license to sell "malt liquors." Held, on a prosecution for unlawfully selling malt liquor, that "malt beverage" is a malt liquor within the charter provision, and that compliance with the Byrd law does not avoid necessity for complying with the charter provision.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 134.*

For other definitions, see Words and Phrases, vol. 5, pp. 4314-4315.* 8 Va.-W. Va. Enc. Dig. 5; 9.]

3. Intoxicating Liquors (§ 134*)—"Malt Liquors."—"Malt liquors" include nonintoxicating, as well as intoxicating, liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144; Dec. Dig. § 134.* 8 Va.-W. Va. Enc. Dig. 5; 34.]

Judgment reversed. All the judges concur.

Error to Circuit Court, Prince William County.

Wade Goodwin was acquitted of unlawfully selling malt liquor by the circuit court on appeal from a conviction before a justice, and the Commonwealth brings error. Reversed.

Robt. A. Hutchison and the *Atty. Gen.*, for the Commonwealth.
S. G. Brent and *Julien Gunn*, for defendant in error.

BUCHANAN, J. The defendant in error, Wade Goodwin, was convicted by a justice of the peace of Prince William county of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

unlawfully selling "malt liquor," or a mixture thereof, in the town of Manassas.

Upon appeal to the circuit court of that county, the whole matter of law and fact being by agreement submitted to the court, there was a judgment in favor of the accused. To that judgment this writ of error was awarded on the petition of the commonwealth.

Upon the calling of the cause, the defendant moved the court to dismiss the writ of error as improvidently awarded upon the ground that this is a prosecution for the violation of the "local option" law of the state, and not for a violation of the law relating to state revenue.

Whether or not a prosecution for the violation of the local option law where there is no pretense that the sale for which the accused is prosecuted was made under a license authorizing it need not be considered in this case. The defense of the accused in the circuit court, as appears from the facts agreed, was that he had the right to make the sale of "malt beverage," the article sold by him, and at the place where it was sold, under the revenue laws of the state. This is denied by the commonwealth.

The question involved in the case would seem, therefore, to come clearly within the provisions of section 88, art. 6, Const. (Code 1904, p. ccxxx), and section 4052 of the Code of 1887 (Code 1904, p. 2134), which confer jurisdiction upon this court to grant a writ of error upon the petition of the commonwealth in a case for the "violation of a law relating to state revenue."

By section 23½, c. 189, p. 285, Acts 1908 (Acts 1908, pp. 275-287, c. 189, known as the "Byrd Law"), it is provided:

"That 'malt beverage' within the meaning of this section shall be construed to be the product of a brewing plant, or brewery, and shall, as to its composition, comply with the standards now, or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be nonintoxicating and in no event contain in excess of two and one-quarter per cent. in volume of alcohol.

"No person, firm, or corporation shall manufacture 'malt beverage,' as herein defined, except subject to the provisions of this act.

" 'Malt beverage' shall be manufactured only by some person, firm or corporation having a manufacturer's malt liquor license, and who shall, before manufacturing the same, pay an additional special license tax of two hundred and fifty dollars (\$250.00) per year, and execute a bond in the penalty of ten thousand dollars (10,000) before and with security (either personal or corporate), approved by the judge of the circuit or corporation court of the county or city in which such manu-

facturing is proposed to be done; the condition of said bond shall be to faithfully comply with the provisions of this act.

"'Malt beverage' shall be sold by the manufacturer direct to the consumer (not to be drunk where sold) and in quantities of not less than one half dozen bottles, nor more than four dozen bottles at any one time, and shall not be sold or offered for sale by any other person, firm or corporation. 'Malt beverage' shall be sold only in bottles in which shall be blown, in letters at least one half inch in height, the name and address of the manufacturer and the words 'malt beverage.' No person, firm or corporation shall place in such bottles and sell or otherwise transfer any liquid containing alcohol in excess of two and one quarter per cent. in volume.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not less than five hundred dollars nor more than one thousand dollars, or, in the discretion of the jury, confined in jail for not less than three months nor more than twelve months for each offense."

By the facts agreed, it appears that the "malt beverage" sold by the defendant answered the description of that article as defined by that section, was sold directly to the consumer, not to be drunk where sold, in quantities of six bottles, with the name and address of the Robert Portner Brewing Company of Alexandria, the manufacturer, blown into each bottle one-half inch in height; that the defendant was acting as the agent of said brewing company in the town of Manassas, which had a license as a manufacturer of malt liquors and had paid the additional special tax and had given the bond required in order to entitle it to manufacture and sell "malt beverage," and, except a state tax of \$5 and a town tax of \$2.50 for a merchant's license, neither the said brewery nor the defendant had paid any license in the said town or county.

Upon the facts agreed, the guilt or innocence of the accused depends upon the question whether a compliance with all the provisions of section 23½ of the said act in all respects authorizes the brewing company to sell "malt beverage" in the town of Manassas through an agent located and doing business in that town.

Several grounds are relied on by the Attorney General to sustain his contention that the brewing company had no such right; but, in the view we take of the case, it is only necessary to consider one of them.

By section 14 of the charter of Manassas (Acts 1901-02, p. 216, c. 215; Acts 1906, p. 204, c. 128), it is provided that "no license shall be granted to any person, club or corporation to sell ardent spirits, malt liquors or any mixture thereof, or any

bitters containing alcohol, either by wholesale or by retail, or to be drunk at the place where sold, within the corporate limits of said town, unless the applicant shall first produce before the court authorized to grant such license the written consent of the town council that the applicant is a corporation under the laws of some state of the United States, or that the person is sober, discreet and of good moral character, and that the place is suitable and convenient, and such certificate shall further show that the said applicant has paid into the town treasury a sum not less than seventy-five dollars nor more than the sum of three hundred dollars, as shall be prescribed by the said council. * * *

By section 28, c. 189, p. 287, Acts 1908, it is provided that nothing in this act shall be construed as changing the provisions of the charter of any town or city touching the granting of licenses.

If "malt beverage" be a malt liquor or a mixture thereof, then under the provisions of the charter of the town of Manassas no license could be granted for its sale therein except with the consent of the town council and a compliance with the other provisions of the charter. That there was no such compliance is clear from the facts agreed. While "malt beverage," as defined by section 23½ of the Byrd law is not intoxicating, it is a malt liquor. It seems to be well settled that the general term "malt liquors" includes both intoxicating and nonintoxicating malt liquors.

Black, in his article on Intoxicating Liquors in 23 Cyc. 41, 60, says that, "if the statute specifically forbids the unlicensed sale of male liquors, the question of the intoxicating properties of the liquor sold is immaterial. It is only necessary to determine whether it was a malt liquor." *Eaves v. State*, 113 Ga. 749, 39 S. E. 318, 321.

See, also, the following cases, where it was held that if the law prohibits or regulates the sale of "cider" by name, without any qualifying word, it applies to all cider, without regard to its intoxicating qualities. *Commonwealth v. Dean*, 14 Gray (Mass.) 99; *State v. Roach*, 75 Me. 123; *State v. Spalding*, 61 Vt. 505, 17 Atl. 844.

In *State v. Kauffman*, 68 Ohio St. 635, 67 N. E. 1062, it was held that a malt beverage which contained less than 2¼ per cent. alcohol, and which was not intoxicating, was embraced within the meaning of an act which related to trafficking in spirituous, vinous, malt, and intoxicating liquors. See *U. S. v. Ducournau* (C. C.) 54 Fed. 138, 139; *U. S. v. Cohn*, 2 Ind. T. 475, 52 S. W. 38.

"Malt beverage" being a malt liquor within the meaning of the charter of the town of Manassas forbidding its sale without a license acquired in the manner prescribed by the charter, the

accused had no right to sell it in that town, even if the effect of section 30 of the Byrd law (Laws 1908, c. 168, p. 287), as contended by the counsel of the defendant, were to repeal section 587 of the Code of 1887 (Code 1904, p. 291), so far as it forbids the sale of "malt beverage" in no-license territory.

It is insisted by the defendant that section 23½ of the act known as the "Byrd law" is unconstitutional. If it were, the result in this case would be the same, since he is not convicted of the violation of any of its provisions.

The judgment of the circuit court must therefore be reversed, and this court will enter such judgment as the circuit court ought to have entered.

Reversed.

Note.

The court of appeals declines here to pass upon the question of the unconstitutionality of § 23½ of the "Byrd Law," so that question rests, so far as judicial decisions are concerned as it was left by the decision of the Circuit Court of Frederick County in the case of *Ex parte Henry*, reported in 14 Va. Law Reg. 596. The Circuit Court then, on habeas corpus proceedings, discharged a prisoner who had been convicted in the Corporation Court of Winchester, under this section of the "Byrd Law," on the ground that this section was not an integral part of that law, and was unconstitutional as being oppressive, unreasonable and uncertain in its meaning.

The main point of this decision is that "malt beverage" is a malt liquor, and that when a town or city charter requires a license for the sale of "malt liquor," it must be complied with, as well as the provisions of the "Byrd Law," before "malt beverage" can be sold there. A very similar case to the principal one is that of *Campbell v. City of Thomasville (Ga.)*, 64 S. E. 815. There it was held that where the state has permitted the sale of "near beer" upon payment of a state tax, municipalities may not, in the absence of express charter authority, prohibit or unreasonably limit and regulate such sale. But they may enact reasonable regulations, and may lay a reasonable license tax upon such sale. However this, it will be noted, is where there is no express charter power to regulate or prohibit. In the principal case such power existed.

"Near beer" is defined in the same case as a term of general currency used to designate any and all malt liquors that are nonintoxicating even when drunk to excess; it includes all malt liquors not within the purview of the general prohibition law. See, also, *State v. Dannenberg (N. C.)*, 63 S. E. 946, where a conviction under a municipal ordinance, prohibiting the sale of any drink for which sale a federal license had been issued or was required, the drink being a malt beverage containing from one-half to two per cent. of alcohol, was set aside. It was held that municipal ordinances must harmonize with state laws, and when the sale of either intoxicating or non-intoxicating liquors was legal under the general state law, in the absence of chartered authority therefor, a municipality could not absolutely prohibit the sale of either.

Another Georgia case bearing some resemblance to the principal case, and relating to the sale of "near beer," is *Burch v. City of Ocilla (Ga.)*, 62 S. E. 666. It was there held that where the state had expressly authorized by license a particular individual (a disabled Confederate soldier) to conduct business anywhere in the state without payment

of any license or tax, with the exception that he should not deal in ardent and intoxicating drinks, a municipality could not require of him a license for the sale of "near beer," a nonintoxicating liquor. The court said: "The mere fact that one of the witnesses testified that the 'near beer' sold contained enough alcohol to preserve it would not afford evidence that it was an ardent drink, any more than an intoxicating drink. "'Ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whiskey, brandy, and gin.' *Sarlls v. United States*, 572, 14 Sup. Ct. 721, 38 L. Ed. 556. According to the proof the drinks sold by the defendant were neither ardent nor intoxicating." And again: "If he was selling either ardent or intoxicating drinks, the municipality could neither license him nor punish him for selling without a license; the power to license the sale of such drinks being forbidden by the state under the terms of the prohibition bill, and the right to punish being also reserved by the state." *Burch v. City of Ocilla*, 62 S. E. 666, 668. See *State v. Dannenberg* (N. C.), 63 S. E. 946, where it is said: "Municipal ordinances must harmonize with such (state) laws, and, where the offense is covered by the latter, the former must give way. This has long been settled."

J. F. M.

WHITE OAK COAL CO. v. CITY OF MANCHESTER.

June 10, 1909.

[64 S. E. 944.]

Licenses (§ 6*)—Power to License—Vehicles Owned by Nonresidents.—The charter of a city provided that the council may grant licenses to owners of wagons, drays, etc., employed in the city for hire, and may require such owners using them in the city to take out a license therefor, and an ordinance declared that no wheel carriage shall be kept in the city for hire unless the owner or keeper thereof procure a license therefor. Held, that the city could not impose a license tax upon the vehicles of a coal company that had no yard within the city, but unloaded coal within the city and delivered it to a purchaser outside the city limits.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 6.* 9 Va.-W. Va. Enc. Dig. 310; 318, 319.]

Judgment reversed. Cardwell, J., absent.

Appeal from Corporation Court of Manchester.

Action by the City of Manchester against the White Oak Coal Company. Judgment for plaintiff, and defendant appeals. Reversed, and proceedings dismissed.

Page & Leery, for appellant.

Charles L. Page, for appellee.

WHITTLE, J. The plaintiff in error, the White Oak Coal Com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.